



TOWN OF BROOKLINE

Massachusetts

BOARD OF APPEALS

DIANE R. GORDON, Co-Chair
HARRY MILLER, Co-Chair
BAILEY S. SILBERT

333 Washington Street
Brookline, MA 02445
617-730-2010
Fax: 617-730-2298

PATRICK J. WARD, Secretary

TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. BOA 070052

On July 25, 2007, the Petitioners, Jeremiah and Cynthia Silbert (the "Silberts"), applied to the Board of Appeals seeking special permits pursuant to Sections 5.22.3 and 8.02.2 of the Zoning By-Law which would allow the Silberts to exceed the maximum gross floor area and otherwise make the property at 106 Spooner Road conforming.

On August 2, 2007 the Board of Appeals met and determined that the properties affected were those shown on a schedule in accordance with the certification prepared by the Assessors of the Town of Brookline and approved by the Board of Appeals and fixed October 11, 2007 at 8:00 p.m. in Hunneman Hall, Main Library, as the time and place of a hearing on the application. Notice of the hearing was mailed to the Petitioners, to the owners of the properties deemed by the Board to be affected as they appeared on the most recent local tax list, to the Planning Board and to all others required by law. Notice of the hearing was published September 20 and 27, 2007 in the Brookline Tab, a newspaper published in Brookline. A copy of said notice is as follows:

TOWN OF BROOKLINE
MASSACHUSETTS
BOARD OF APPEALS
NOTICE OF HEARING

Pursuant to M.G.L., C.39, sections 23A & 23B, the Board of Appeals will conduct a public hearing to discuss the following case:

Petitioner: **SILBERT, Jeremiah and Cynthia**
Location of Premises: **106 SPOONER RD BRKL**
Date of Hearing: **10/11/2007**
Time of Hearing: **08:00 p.m.**
Place of Hearing: **Main Library, Hunneman Hall, 2nd fl.**

A public hearing will be held for a special permit and/or variance from:

- 1) 5.22(3), Exceptions to Maximum Floor Area Ratio (FAR) Regulations for Residential Units; Special Permit Required.**
- 2) 8.02.2, Alteration or Extension; Special Permit Required.**

Of the Zoning By-Law to validate the existing FAR of the residence at **106 SPOONER RD BRKL.**

Said Premise located in a **S-10** District.

Hearings, once opened, may be continued by the Chair to a date and time certain. No further notice will be mailed to abutters or advertised in the TAB. Questions regarding whether a hearing has been continued, or the date and time of any hearing may be directed to the Zoning Administrator at 617-734-2134 or check meeting calendar at: <http://calendars.town.brookline.ma.us/MasterTownCalendar/?FormID=158>.

The Town of Brookline does not discriminate on the basis of disability in admission to, access to, or operations of its programs, services or activities. Individuals who need auxiliary aids for effective communication in programs and services of the Town of Brookline are invited to make their needs known to the ADA Coordinator, Stephen Bressler, Town of Brookline, 11 Pierce Street, Brookline, MA 02445. Telephone: (617) 730-2330; TDD (617) 730-2327.

**Diane R. Gordon
Harry Miller
Bailey S. Silbert**

Present at the hearing was the Chair, Harry Miller and Board Members Diane Gordon and Larry Kaplan. The owners, Dr. and Mrs. Silbert, were present at the hearing and were represented by Attorney Jeffrey Allen of Seegel, Lipshutz and Wilchins, P.C., 20 William Street, Suite 130, Wellesley, MA 02481. Attorney Allen submitted a written memorandum in support of his clients and presented their case at the hearing.

Mr. Allen described the case as “troubling, overblown and simple”. He said no matter how well intentioned the opposition might be, the case does not deserve the attention it has received. His clients, Dr. and Mrs. Silbert have lived at 106 Spooner Road for thirty-nine years. Attorney Allen said that this is not a case where a developer has bought a piece of property and is seeking a change. The Silberts, he said, raised their children in this home and they have been part of the Brookline community for thirty nine years. He said that the Silberts have always owned two lots; one, where their home is at 106 Spooner Road and another, abutting lot, at 243 Middlesex Road. He said that 243 Middlesex Road has always been considered by the Town as “buildable”, that it was germane to this hearing, because the Town went to the Appellate Tax Board in June of 1998 to insure that this rear lot was taxed as a buildable lot. He said Town Counsel, at that time, submitted an affidavit of the Building Commissioner to the Board indicating that it was a buildable lot and should be taxed as such. He said the relief he is seeking has been represented as “subterfuge” because the Silberts really want to build on the Middlesex Road lot. He said that there is no subterfuge, that this is exactly what they are trying to do. He said that regardless of the Board’s decision, they will build on the Middlesex Road lot. He said the relief sought is to do it in a manner that makes sense for his clients. He said that from a zoning perspective the Middlesex Road lot cannot get a building permit because the 106 Spooner Road lot needs additional area to meet floor area ratio requirements. He said that approximately 1,009 s.f. is needed to make the house at 106 Spooner conform. On March 21, 2006, prior to the advertisement of the zoning change, the Building Department issued a permit to the Silberts to decommission their attic and basement space; and, he said, his client still has that valid building permit which has been extended by the Building Commissioner. He said that

tomorrow morning the Silberts could decommission their attic and basement and pull a building permit for 243 Middlesex Road.

Board member Larry Kaplan described the attainment of the Building Permit before the first advertisement of the decommissioning change of the by-law as a non-plan freeze. He asked Attorney Allen how long he thought the freeze was effective. Attorney Allen replied "as long as there is a valid building permit". Mr. Kaplan replied that his reading of Chapter 40A, section 6 provides a six month freeze. He said that the extension of the building permit does not extend the freeze. Attorney Allen said he disagreed, that Chapter 40A provides that the zoning in effect at the time of either the issuance of a special permit or building permit is the zoning that controls the project. Mr. Kaplan read the provision to which he was referring as follows: "A zoning ordinance or by-law shall provide that construction or operations under a building or special permit shall conform to any subsequent amendment of the ordinance or by-law unless the use or construction is commenced within a period of not more than six months after the issuance of a permit and in cases involving construction is continued through to completion as continuously and expeditiously as is reasonable". Mr. Kaplan said that the Building Commissioner has no authority to extend the statutory provisions of section six. Attorney Allen said that Mr. Kaplan was talking about a "plan freeze". Mr. Kaplan responded by saying that this was a "non-plan freeze" and that work would have had to commence in accordance with the statute. Attorney Allen argued that the section regarding zoning amendments does not affect any project that has either a special or building permit, and he said that the argument was not germane to the issue at hand. Mr. Kaplan disputed Attorney Allen's assertion that his client could now decommission the space. Attorney Allen responded that his client already has the permit to decommission and it was not appealed and is final. He said that

until such time as someone comes in under an enforcement action the permit for decommissioning is not properly before the Board of Appeals. Mr. Kaplan summed-up by saying that he questioned whether the Silberts now have the right to decommission under the by-law to free-up square footage to meet the requirements as to floor area ratio.

Attorney Allen said that the decommissioning discussion alone, points out the problems he sees with the whole case and the opposition. He said that one cannot deny that what his clients are doing is to ask the Board of Appeals to legalize something that anyone else in Brookline can do as a matter of right. The Chair asked when the attic and basement were finished. Attorney Allen replied that the records of the Building Department show that many additions had been done to the property over time but that the only permit in the file is the original building permit for the home. He said that clearly the work was done in excess of ten years ago and that fact was not a matter of dispute. Attorney Allen said that if the house was built more than ten years ago, under Section 5.22.2, of the zoning by-law, there is no question that if the attic was not built-out today, they, as a matter of right, could walk in to the Building Department and get a permit to finish the space. He said anyone with a home more than ten years old, could finish their attic or basement up to 150% of the FAR as of right. He said that no-one disputes that their rear lot can be built on and they could finish their attic as a matter of right. Attorney Allen said he was before the Board to ask for one of two things: that the Board declare that the space that the Silberts finished in the attic and basement is legal or that they issue a Special Permit to accomplish the same thing.

He said his clients have paid taxes on a buildable lot and they want to build on that lot and legalize the use of their attic and basement just as anyone else can do in Town. Attorney Allen stated that the clear intent of the zoning by-law was to allow the use of attics and basements of

existing homes especially where there is no external evidence of the use. Attorney Allen pointed out that the zoning by-law gives the Board standards to grant a Special Permit and if they look they will see that the Silberts have met every one of those standards.

The Chair asked for a clarification of Attorney Allen's statement that regardless of the Board's decision, they will build on 243 Middlesex Road. Attorney Allen said that depending upon who is correct in their interpretation of the zoning freeze; they could decommission the attic and basement or if Mr. Kaplan's opinion prevails remove a portion of the existing structure to assure conformity.

Mr. Kaplan referring to Attorney Allen's memorandum, agreed that after the ten year statute of limitations for work done without a permit, no-one can force the demolition of this work. He said the Board had gotten a lot of correspondence both in support of the Silberts and against. He said he was sure that the Silberts were very nice people but the Board had to deal with the by-law. Mr. Kaplan said one of the points the opposition raise is whether or not the Silberts are actually converting attic and basement space into true habitable space or whether it has already been converted, therefore 5.22.2 wouldn't apply. He said that there is nothing anyone in Town can do to cause the Silberts to decommission that space because it was legalized when the ten years passed. He said that there are no grounds for the Silberts to be before the Board at this time asking for any relief because they are already protected by operation of law. Mr. Kaplan said that he was not sure that there was any conversion, that it had been converted by operation of law. However, this does not mean that the property is conforming with respect to floor area. Unfortunately, when the back lot got conveyed-out, the Silberts were left with attic and basement space that contributes to gross floor area. Attorney Allen went on to say that looking at the house from the street no-one could see any difference when this space was finished. Mr. Kaplan stated that this house had already been

converted by operation of law. Attorney Allen agreed that there is no necessity to be before the Board but his client has the right to ask for a special permit under section 5.22 of the by-law to build-out up to 130% of the FAR allowed. Mr. Kaplan stated that the Silberts created the need for relief by conveying-out the back lot. Mr. Allen stated that the fundamental unfairness of the by-law is that anyone else that lives in his home for ten or more years can do what the Silberts request by right.

The Chair asked whether anyone would like to speak in favor or in opposition to the proposal.

The following residents spoke in opposition and/or submitted written memoranda: Gunther Fritze of 84 Spooner Road; Richard Benka of 26 Circuit Road; Judith Selwyn of 285 Reservoir Road; John Vanscoyoc of 307 Reservoir Road; Michael Maynard of 24 Crafts Road a member of the Chestnut Hill Neighborhood Association; Roger Blood of 69 Cleveland Road and John Reece of 218 Middlesex Road. The neighbors who spoke in opposition indicated the detrimental effect that granting the relief would have in terms of two houses on lots that were too small for the size and bulk of the original home. Neighbors raised concern as to the detrimental impact this proposal would have on the neighborhood and they wanted to protect the character of their neighborhood. In addition, Mr. Benka discussed why relief via a special permit was not appropriate because the space was not being converted to from non-habitable to habitable space. The Board also took note of the memoranda filed with the Board by Mr. Benka and Judith Selwyn.

Attorney James Wagner, counsel for the Fogg family at 109 Spooner Road, also spoke in opposition to the application. He stated that in his opinion the event that causes the question of whether there is adequate lot area to support the floor area at 106 Spooner Road is the application

for a building permit for the lot at 243 Middlesex Road and not the building permit to decommission the space at 106 Spooner Road.

Dave Hilburn of 280 Reservoir Road mentioned the importance of protecting open green space in the area, and stated that the petitioner's proposed action would adversely impact the neighborhood.

Charles Silbert, son of the Petitioners and owner of 243 Middlesex Road spoke in favor of the application and opined that his parent's request was as of right under Section 5.22.2 of the by-law and 5.22, exceptions for floor area ratio.

Dr. Jeremiah Silbert spoke on his own behalf. He said that when they bought the property 39 years ago they paid more for it than they would have if it did not have a separate lot. He said that they always assumed that the separate lot was buildable. He said when they appealed the tax on the separate lot they were told by the Town it was buildable and they have been paying taxes on a buildable lot since.

Town Counsel, Jennifer Dopazo provided her opinion on several issues raised during the hearing. She opined that Section 5.22.3 did not apply to the relief sought because the space was currently habitable space and Section 5.22.3 only applies to space not habitable at the time of the conversion. She disagreed that the Silberts could convert as a matter of right because the space was already habitable. She stated that the Building Permit to decommission which was issued prior to the change in the by-law which now prohibits decommissioning had expired. She cited two cases in support of her opinion. She noted that adjacent lots in common ownership are treated as a single lot for zoning purposes in order to minimize nonconformities. In her opinion the 243 Middlesex lot is

not buildable if the original house is too large for its lot, and that the owner should not get zoning relief for a nonconformity which he created.

Polly Selkoe, Assistant Director for Regulatory Planning, said that the Planning Board by vote of 3 – 2 made the recommendation that the Board of Appeals deny the application. The Board also believed that because the space is already habitable, because of the way the by-law is written you cannot convert it to habitable space. She said that relief should be requested for the new lot when the building permit application is made.

Michael Shepard, Zoning Administrator, reviewed the history of the case and voiced his support of the analysis provided by Town Counsel.

Frank Hitchcock representing the Building Department spoke in opposition to the application because in his opinion relief by way of a special permit was inappropriate.

Attorney Allen then spoke in rebuttal and reiterated his arguments for relief under Section 5.22.3.

The Board closed the hearing and after deliberating found that relief by way of a special permit under Section 5.22.3 and 8.02.2 was not available, because the space in question was already habitable. They determined that this would not be an interior conversion as contemplated by the zoning by-law. In addition, the Board determined that even if relief by way of special permit was an option, the Petitioners did not meet the standards for granting a special permit under section 9.05 of the by-law.

Upon motion it was unanimously voted to deny the relief requested.

Unanimous Decision of
The Board of Appeals

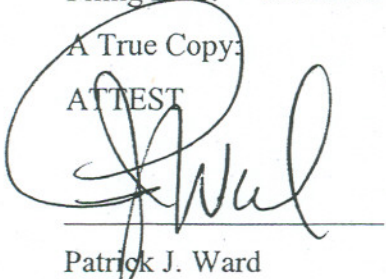
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Harry S. Miller, Chair

Filing Date: December 13, 2007

A True Copy:

ATTEST


Patrick J. Ward

Clerk, Board of Appeals

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